

Managing Litigation

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Litigation Goals

- The Defendant's goal in litigation should be to get the claims dismissed before trial
- Trial is expensive and involves a great deal of risk, even if you are confident in your defenses
- How you handle the pre-trial stages of litigation will help you avoid trial where possible
- Pre-Trial Stages:
 - Early Stages (Initial Actions, Answer, Rule 12 and 68)
 - Discovery
 - Summary Judgment

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Litigation: Early Strategies

- Complaint is filed and served
- UCIP has assigned counsel
- What are your next steps?

- How you approach a claim early on can drastically shape the rest of the case.

- Tools for crafting your defense:
 - Initial Evaluation
 - Answer and/or Rule 12 Motions
 - Rule 68 Offer of Judgment

Initial Client Meeting

- When
 - Ideally shortly after outside counsel is appointed and before the initial evaluation and answer
- What
 - Opportunity to meet all players
 - Gather information and documents
 - Discuss facts, strategy
- Who
 - All named defendants, in-house counsel, any essential witnesses employed by the County

Initial Client Meeting

- Why
 - Introductions
 - Facilitates transfer of documents to counsel
 - Opportunity to conduct interviews of important witnesses to get the County's side of the story

Initial Evaluation Letter

- When
 - Before or shortly after the answer and initial client meeting
- What
 - Summary of the facts currently known
 - Evaluation of the claims
 - Introduction to possible defense and litigation plan
 - Proposed budget
- Who
 - Sent to UCIP and all clients

Initial Evaluation Letter

- Why
 - Open the lines of communication
 - Establish expectations for your attorney
 - Develop a plan to litigate (or settle) the case
 - Educate regarding the applicable legal standards
 - Identify issues to be raised in motions
 - Identify discovery needs

Answer

State Court

- 21 days after service
- Waiving service does not buy more time, but all parties have "a duty to avoid unnecessary expenses of serving the summons and complaint." Utah R. Civ. P. 4(d)(3)(A).

Federal Court

- 21 days after service or 60 days after a request to waive service was sent, if accepted

Answer

- Respond to each and every allegation with admit, deny, or lack sufficient information
- Object to certain allegations where appropriate
- Affirmative Defenses
 - Some can be waived if not raised here
 - Consider raising state governmental immunity provisions
- Jury demand

Rule 12 Motions

12(b)(6) Motion to Dismiss

- Must be raised 21 days after service of Complaint
- Standard: failure of the pleading to state a claim for which relief can be granted
- Must not consider matters outside the pleading

12(c) Motion for Judgment on the Pleadings

- Must be filed after pleadings but early enough to not delay trial
- Applies the same standard as a Rule 12(b)(6) motion
- Must not consider matters outside the pleadings

Rule 12 Motions

- Common Defenses to Consider:
 - Are the claims adequately pled?
 - Can certain parties be dismissed outright?
 - Sub-governmental entities, administrators in their official capacity
 - Does the Governmental Immunity Act apply? If so, consider the following requirements:
 - Notice of Claim
 - Statute of Limitations
 - Undertaking
 - Willful misconduct for individual employees
 - Exceptions to the waivers of immunity

Rule 68 Offer of Judgment

- Offer of Judgment: offer to allow judgment to be entered based upon specified terms, with costs (and fees where applicable) then accrued
 - Must be served at least 14 days before trial
 - Must allow 14 days to respond
 - If unaccepted and the ultimate judgment obtained is "not more favorable than the unaccepted offer," the Plaintiff must pay the Defendant's costs incurred after the date the offer was made
 - Utah R. Civ. P. 68 also provides that in this scenario the "offeror is not liable for costs, prejudgment interest or attorney fees incurred by the offeree after the offer"

Rule 68 Offer of Judgment

- Purpose: encourage settlement and avoid litigation
- Most useful in cases brought under fee shifting statutes, like 42 U.S.C. § 1983, where attorney fees are considered to be part of "costs"
- Offer must be clear as to whether costs are included within its scope, or will be determined by the court and added on top of the offer
- Carefully draft the offer: several courts have found that ambiguous offers must be construed against the defendant
- Consider the most strategic time to make the offer, preferably before the plaintiff has racked up a bunch of attorney fees

Litigation: Discovery

- If any claims survive your early strategies, what do you do next?
- Discovery
 - Disclose your evidence and witnesses (including experts)
 - Examine the other side's evidence
 - Interrogatories
 - Requests for Production
 - Requests for Admission
 - On-Site Inspections
 - Gather evidence from witnesses and third parties
 - Depositions
 - Subpoenas
 - Affidavits

Discovery

- Discovery can be the most expensive part of litigation.
- Expenses can be minimized by:
 - Narrowing the issues with effective early strategies
 - Staying focused on evidence that relates to the elements of the claims and your defenses and serving targeted written discovery
 - Good communication between the client's record custodian and counsel
 - Depositions of only key witnesses
 - Avoiding creation of a factual dispute when one is not necessary

Litigation: Summary Judgment

- Rule 56: grants judgment in favor of the party who can show that there is no genuine dispute of a material fact and they are entitled to judgment as a matter of law
- This is the stage where the defendant can test the plaintiff's ability to prove their claims with undisputed evidence
- Summary Judgment motions can be difficult and time consuming depending upon the complexity of the record evidence

Summary Judgment

- Rely only upon undisputed facts
 - If the Court finds a dispute of fact, the issue will proceed to trial
- This is also a good stage to evaluate whether claims that will probably survive summary judgment should be resolved through an alternative method
 - Mediation
 - Settlement Discussions

Questions?